Martin Industries, Inc., Huntsville Division *and* International Molders and Allied Workers Union. Case 10–CA–22189

August 16, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 17, 1988, Administrative Law Judge Robert A. Gritta issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Martin Industries, Inc., Huntsville Division, Huntsville, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Josephine S. Miller, Esq., for the General Counsel.
Brent L. Wilson, Esq. (Elarbee, Thompson & Trapnell), of Atlanta, Georgia, for the Respondent.
Hubert Coker, Coordinator, of Madison, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on 30 July 1987 in Huntsville, Alabama, based on a charge filed by International Molders and Allied Workers Union (the Union) on 11 December 1986 and a complaint issued by the Regional Director for Region 10 of the National Labor Relations Board on 3 February 1987.[1] The complaint alleged that Martin Industries, Inc., Huntsville Division (Respondent) violated Section 8(a)(1) and (3) of the Act by refusing to grant its employees quarterly merit wage increases and the annual general wage increase. Respondent's timely answer denied the commision of any unfair labor practices.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel and Respondent.

On the entire record in this case, and from my observation of the witnesses and their demeanor on the witness stand, and on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Martin Industries, Inc., Huntsville Division is an Alabama corporation engaged in the manufacture of gas and wood burning heaters in Huntsville, Alabama. Jurisdiction is not in issue. Martin Industries, Inc., Huntsville Division in the past 12 months, in the course and conduct of its business operations, shipped products from its Huntsville, Alabama facility valued in excess of $50,000 directly to points located outside the State of Alabama. I conclude and find that Martin Industries, Inc., Huntsville Division is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ISSUES

1. Whether Respondent's withholding of merit wage increases from its Huntsville employees on 1 July and 1 October 1986 and 1 January and 1 April 1987 violated the Act.

2. Whether Respondent's withholding of its annual general wage increase from its Huntsville employees in August 1986 violated the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

There is little or no factual dispute involved here. Historically, Respondent operated four plants in Alabama. The plants were located in Huntsville, Athens, Florence, and Sheffield.[2] The Florence and Sheffield plants are unionized whereas the Athens plant is nonunion. The Huntsville plant, at all times material, was the subject of a union organizational drive culminating in several Board-conducted elections.

Over the years, Respondent maintained a policy of granting annual general wage increases to the Huntsville employees. Pursuant to the policy, all employees at the Huntsville facility received the following wage increases:

January 1980, an increase equal to 14 percent of their hourly wage.

January 1981, an increase equal to 10 percent of their hourly wage.

January 1982, an increase of 30 cents per hour.

August 1983, an increase of 25 cents per hour.

August 1984, an increase equal to 7 percent of their hourly wage.

August 1985, an increase of 30 cents per hour.

In addition to the general wage increase policy, Respondent maintained a quarterly merit wage increase policy for the Huntsville employees. The policy provides:

[1] All dates are in 1986 unless otherwise indicated.

[2] The Florence plant was sold 1 January 1987.

> Your supervisor should evaluate your job performance, attendance, and attitude at the end of your first ninety (90) days of employment and may increase your base pay. Future pay increases will be considered at the end of each calendar quarter, if evaluation indicates a raise is warranted, until the top pay scale of the job classification is reached. An employee does not "automatically" advance to the top pay classification. Advancement depends upon the employees' demonstration of skill and qualifications in the judgment of his supervisor.

The same merit wage increase policy and annual general wage increase policy apply to the Athens facility employees.

Events of 1986 at the Huntsville Plant

On 17 January, the Union filed a petition for representation of Respondent's employees in Case 10–RC–13267. An election was conducted on 2 April. The unit of employees voting was:

> All production and maintenance employees, including plant clericals, lead men, quality control inspectors, warehouse employees, control repair division (CRD) employees and machine shop employees at the employer's Seminole Drive and Governors Drive, Huntsville, Alabama location, but excluding all other employees of the employer, including office clericals, guards, watchmen and supervisors as defined in the National Labor Relations Act.

The tally of ballots showed approximately 179 eligible voters with 85 votes for the Union and 87 votes against the Union. No ballots were challenged, but one ballot was voided.

The Union, on 9 April, filed objections to the election. The Regional Director, on 14 May, issued a Supplemental Decision and Direction of Second Election based on the Union's meritorious objections. A second election was conducted on 11 June. The resultant tally showed that approximately 175 voters were eligible and 86 ballots were cast for the Union with 85 ballots cast against the Union. No ballots were challenged or voided. On 16 June, Respondent filed objections to the election. On 18 June, a second supplemental decision, order directing hearing on objections, and notice of hearing was issued by the Regional Director, dismissing certain objections and scheduling the remaining objection for an evidentiary hearing. Following the Regional Director's decision, Respondent discontinued its quarterly merit wage increase policy at its Huntsville facility for the bargaining unit employees. The quarterly merit wage increase policy at the Athens facility continued uninterrupted.

On 7, 8, and 12 August, a hearing on objections was conducted in Huntsville, Alabama. Within this same timeframe, Respondent discontinued its annual general wage increase policy for the Huntsville employees within the appropriate bargaining unit. However, all nonbargaining unit employees at Huntsville received the annual general wage increase in August. Likewise, all employees at the Athens facility received their annual general wage increase in August.

The hearing officer, on 3 October, issued a report and recommendation on objection finding merit to Respondent's objection and recommending that the Board sustain the objection. On 10 April 1987, the Board adopted the hearing officer's report and recommendation and issued a Decision and Direction of Third Election. Respondent, on 13 April 1987, granted a general wage increase and reinstated its quarterly merit wage increase program for its Huntsville facility employees.

Respondent discontinued the quarterly merit wage increase program and the annual general wage increase policy for the bargining unit employees at the Huntsville facility because its objections to the second election were pending final resolution by the Board. All wage increases were withheld from the bargaining unit employees at Huntsville without explanation to the employees.[3]

Louis Martin testified he is now the vice president of engineering and in 1986 was plant manager of the Huntsville facility. As plant manager, he had partial responsibility to decide the range of wage increases under the merit wage increase policy and based on his supervisor's evaluations to decide the amount of merit wage, if any, within the established range, to grant each eligible employee at Huntsville. Martin also had partial responsibility to decide the amount or percentage of each annual general wage increase for Huntsville employees.

Each year merit wage increases are given 1 January, 1 April, 1 July, and 1 October with supervisory evaluations completed a week prior to the start of the quarter. Albeit, all Huntsville employees received the merit wage increase on 1 April, Martin did not participate in the wage decision because he had previously assumed his new duties and was no longer the plant manager. The annual general wage increase is given in August in both the Huntsville and Athens divisions. The merit wage increase range for 1986 was zero to 20 cents. Following the election within a week or two, Martin consulted counsel about the propriety of giving merit wage increases for the third quarter. Counsel's advice was to discontinue the merit wage increase program for bargaining unit employees at Huntsville, but to continue the merit program uninterrupted at the Athens facility. Thus, no merit wages were given 1 July or 1 October 1986 or 1 January or 1 April 1987 at Huntsville for all employees involved in the union organizing campaign. Nonunit employees continued receiving their merit wage increases each quarter. Likewise, no supervisory evaluations were made during those same quarters for any employees involved in the union organizing campaign, but nonunit employees continued being evaluated.

Respondent also consulted with counsel on the propriety of giving the annual general wage increase to the Huntsville employees in August 1986. The decision was to withhold the annual general wage increase from the Huntsville bargaining unit employees and to grant the increase to the nonunit employees. The decision was based

[3] The above originates in a stipulation of facts, other objective evidence in the record, and uncontroverted record testimony.

solely on the union organizational status of the Huntsville plant and the case pending before the Board. Additionally, Respondent granted the annual general wage increase to all employees at the Athens facility.

Immediately following the Board's Order of 10 April 1987 directing a third election, Respondent reinstated its merit wage increase program and granted merit wage increases to the bargaining unit employees of the Huntsville Division. At the same time, the bargaining unit employees received the general wage increase previously withheld in August 1986.

Martin stated that neither wage increase was withheld from the Huntsville employees to punish or discriminate against employees voting for the Union.

Analysis and Conclusions

The General Counsel contends that Respondent's actions of withholding wage increases while a representation case is pending are per se violations of the Act. Alternatively, the General Counsel argues that Respondent has failed to rebut her prima facie case of discrimination.

Respondent argues that its actions of withholding the two wage increases were lawful because it was maintaining the status quo required by the law. Respondent further contends that the instant case is distinguishable from the cases involving wage actions immediately prior to an election or the cases involving ultimate certification of the union, creating a presumption that prior instituted changes in wages were unlawful. Respondent would place controlling emphasis on the fact that its objection to the second election was meritorious to make legitimate both the withholding of wages as well as the reinstitution of the wage programs.

Both parties have cited Board and court cases to support their differing positions. Those cases considering, prejudice to the collective-bargaining posture of the parties, an employer's obligation to bargain where the wage increases are discretionary, or the interrelation between organized and unorganized units separate and distinct from one another, I have considered to be inapposite and therefore not helpful to my determination. The remaining citations, particularly those employing the approach of looking at all the relevant circumstances to determine whether the employer intended, by its actions, to discourage union activity, I found helpful and did consider.

On the surface, wage issues, like those in the instant case, appear to fall within that "damned if you do and damned if you don't" category but "it ain't necessarily so." Where the facts show otherwise, an employer will not be found in violation of the Act.

Several Board cases over the years have reaffirmed yardsticks to be followed by employers undergoing a union organizational campaign. I am guided by the following rules of case law:

> Absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. [*Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701 (1974).]
>
> [D]uring union organizing [a]n employer must take the action that it would have taken were there no union activity underway. [*Associated Milk Producers*, 255 NLRB 750 (1981).]
>
> [W]ithholding of pay raises from employees who are awaiting the holding of a Board election violates the Act if the employees otherwise would have been granted the pay raises in the normal course of the employer's business. [*Progressive Supermarkets*, 259 NLRB 512 (1981).]
>
> When an employer, prior to a union campaign, has an established wage increase policy, the suspension of that policy during the union campaign will normally be found to violate Sec. 8(a)(3) unless the employer postpones the increases only for the duration of the campaign and informs the employees at the time of the postponement that the sole reason for its action is to avoid the appearance that it seeks to intervene in the election, and the Board finds that this in fact was its reason. [*Smith & Smith Aircraft Co.*, 264 NLRB 516 (1982).]
>
> [Generally,] an employer violates Section 8(a)(3) and (1) when it varies from its established practices of granting wage increases and other benefit improvements because of the pendency of a representation campaign or because a labor organization has been elected by its employees to represent them for collective-bargaining purposes. [Not the law of the case but an affirmation of the general rule.] [*Peabody Coal Co.*, 265 NLRB 93 (1982), enfd. in part 725 F.2d 357 (6th Cir. 1984).]

It is undisputed that Respondent had an established wage policy respecting quarterly merit wage increases and annual general wage increases. The quarterly increases were based on a range of zero to 20 cents and the annual was a percentage increase usually decided in late July. Further, the decisions to withhold the quarterly increases for 1 July, 1 October 1986, 1 January, 1 April 1987, and the annual general wage increase of August 1986 were based on the Union's presence in the continuing organizational campaign and the advice of counsel. Throughout Respondent's entire organization, the only employees denied wage increases were the bargaining unit employees at Huntsville. All other employees, including nonbargaining unit employees at Huntsville, received all wage increases due pursuant to the established wage policies.

Respondent argues that employers are in peril, no matter what they do, because the risks are too great during union campaigns. Here, the risks emerged in January, but were assumed when the 1 April quarterly merit wage increase was implemented just prior to the first election of 2 April. The risks apparently only became perilous to this Respondent after the 11 June election won by the Union. Indeed, Respondent contends that the peril ceased to exist with the Board's Order setting aside the second election and directing a third election on 10 April 1987, and therefore on 13 April 1987 the aborted wage programs were once again reinstituted. Somewhat

contrariwise, Respondent also contends that its cessation of the wage programs was its way of maintaining the status quo. Clearly, the status quo is evidenced by the wage increases granted to the Athens plant employees and the nonbargaining unit employees of the Huntsville plant, not the withholding of wage increases for selected employees. Although the Board recognizes that employers can freely give benefits to unrepresented employees while negotiating wages with the representative of other employees, the key is the established bargaining obligation of the employer. Here no such obligation is established, but rather, employees supporting the Union still are faced with an election of their chosen representative. That is to say, here, the employees' vote is still subject to influence by Respondent's wage policies policies that Respondent wants to control, as if by a valve, and turn on or off depending on the outcome of an election.

Additionally, Respondent argues that the absence of any evidence that it used the withholding of the wage increases to undermine employee support for the Union or made comments implying that the Union or the employees' selection of the Union was the cause of the withholding, preclude any finding of discrimination. As further support for its argument, Respondent emphasizes the testimony of Martin that the decisions to withhold the wage increases were not based on a desire to punish or discriminate against employees for selecting the Union as their collective-bargaining representative. But, admittedly, the wage increases were withheld because of the pending representation case and only after the employees selected the Union as their collective-bargaining representative.

In my view, it is impossible to separate the effects of Respondent's wage policy conduct on the employees from the conduct itself. The merit wage and annual wage practices were well established. All employees knew to expect five wage increases during any given year. Without any explanation for the cessation, bargaining unit employees would clearly attribute the loss of wages to the successful union campaign, just as the nonbargaining unit employees would attribute their continuing wage increases to the lack of unionization. Thus, by its silence, Respondent has squarely placed the onus for no wage increases on the union activity of its employees. A reasonably prudent employer would have foreseen that such a sterile cessation of past wage practices for bargaining unit employees would be viewed by those employees as punishment for past union activities and as a warning for the future exercise of Section 7 rights in subsequent elections. Although I cannot discredit Martin's self-serving testimony of the nonbasis for the decisions to withhold the several wage increases, I can, and do, conclude and find that the foreseeable effect of the decisions to withhold wages outweigh the probative value of Martin's statement. In the least, a cancellation of expected wage increases is obviously susceptible of being understood by bargaining unit employees as interference with their union organizational rights. The legislative mandate prohibits interference, whether intentional or not, and whether pursuant to bona fide competent advice of an expert. Advice of counsel therefore is not a defense to conduct found unlawful because of the coercive effect on employees. I therefore find that Respondent has unlawfully interfered with its employees' Section 7 rights and thereby violated Section 8(a)(1) of the Act. I further conclude and find that Respondent, by failing to continue to apply its established wage increase practices to bargaining unit employees and by failing to grant wage increases pursuant to those practices to employees who would otherwise have received them, but for their selection of the union as their bargaining representative, is sufficient to support the inference that the employees' protected activity was a motivating factor in Respondent's decision. Respondent's unlawful motive is further evidenced by the preferential treatment accorded the unrepresented employees who received without interruption all the wage increases pursuant to Respondent's wage policies. Such disparity tends to discourage employees' exercise of their Section 7 rights. The General Counsel has clearly established a prima facie case of discrimination under the Board's decision in *Wright Line*, 251 NLRB 1083 (1980). Just as clearly, Respondent would not have taken the same action in the absence of the protected union activity of its employees. Accordingly, I find that Respondent, by withholding the wage increases from its bargaining unit employees while granting the wage increases to its unrepresented employees, has violated Section 8(a)(3) and (1) of the Act.

My conclusions and findings are further supported by the fact that the reinstatement of the withheld wages was precipitated by the Board Order nullifying the election won by the Union and directing a third election.

CONCLUSIONS OF LAW

1. By canceling scheduled wage increases for bargaining unit employees during a union organizational campaign, Respondent has interfered with employees' exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

2. By failing to give wage increases to bargaining unit employees because they selected a union as their bargaining representative, while granting the wage increase to its unrepresented employees, Respondent has discriminated against its represented employees in violation of Section 8(a)(3) and (1) of the Act.

3. The unfair labor practices described above have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.[4]

[4] The General Counsel moved for a remedial order containing a visitatorial provision authorizing "discovery," if necessary, to monitor compliance with the Board's Order The need for such an order is not demonstrated and I therefore deny the General Counsel's motion

Having discriminatorily denied wage increases to its bargaining unit employees of its Huntsville Division, Respondent must make evaluations of those employees for 1 July and 1 October 1986 and 1 January and 1 April 1987, and grant increases in accord with its merit wage increase policy. Also, quarterly interest on the merit wage increases shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5]

In addition, Respondent must grant to its bargaining unit employees the same annual wage increases given to nonrepresented employees in August 1986, less the amounts received in April through August 1987, with interest, computed in the manner prescribed above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Martin Industries, Inc., Huntsville Division, Huntsville, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Canceling scheduled wage increases for bargaining unit employees of the Huntsville Division during any union organizational drive.

(b) Discriminating against its bargaining unit employees of the Huntsville Division by withholding wage increases because they selected a union as their bargaining representative.

(c) In any like or relate manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Evaluate bargaining unit employees of the Huntsville Division in accord with its merit wage policy for the quarters beginning 1 July and 1 October 1986 and 1 January and 1 April 1987, and grant wage increases for those quarters to all eligible bargaining unit employees with interest as outlined in the remedy section of this decision.

(b) Grant the same general wage increase to bargaining unit employees of the Huntsville Division as it granted to nonrepresented employees in August 1986, less those amounts previously received in April through August 1987, with interest as outlined in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its offices in Huntsville, Alabama, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT cancel scheduled wage increases for our bargaining unit employees at the Huntsville Division during any union organizational drive.

WE WILL NOT discriminate against our bargaining unit employees of the Huntsville Division by withholding wage increases from them because they selected a union as their bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole all bargaining unit employees at the Huntsville Division for any loss of earnings and other benefits resulting from our discrimination against them, plus interest.

MARTIN INDUSTRIES, INC., HUNTSVILLE DIVISION